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Supreme Court, U.S.
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No. 90____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARY McDERMOTT and ALPHONSE IANNACONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 29, 1991

QUESTIONS PRESENTED FOR REVIEW

Are the misdemeanor provisions of Section 242 of Title 18 (Constitutional rights deprived by officials acting in official capacity) subsumed by the felony provisions of Section 241 of Title 18 (citizens injured, oppressed, threatened or intimidated in free exercise or enjoyment of Constitutional rights by persons taking the law into their own hands)?

Are the criminal sanctions of either Section 241 or Section 242 applicable to a misdemeanor arrest by a police officer without any motive except to perform official duty, merely because the arrest was found to be knowingly without probable cause?

Are the penal provisions of Sections 241 and 242 of Title 18 co-extensive with the civil remedies provided by Section 1983 of Title 42?

Were petitioners denied their right under the Fifth Amendment to the Constitution to indictment by a Grand Jury where the Grand Jury proceedings were conducted in the context of intense publicity sponsored by the Government asserting that petitioners were racially motivated in making eight misdemeanor arrests without probable cause and the Grand Jury indictment specified the race of those arrested, and thereafter at the trial the Government conceded that it did not have and never had any basis for the charge that the petitioners were racially motivated?

Were petitioners denied their rights to remain silent and to receive a fair trial guaranteed by the Fifth Amendment to the Constitution when, in the course of his summation at the conclusion of the trial, the prosecutor made pointed reference to the fact that petitioners had not taken the stand and further denounced petitioners repeatedly as "liars" and their contemporary notebooks as "lies"?

PARTIES

Petitioners are Mary McDermott and Alphonse Iannacone.

Respondent is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Mary McDermott and Alphonse Iannacone, respectfully petition this Court for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 918 F.2d 319 (1990), and is reproduced in Appendix A below.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 21, 1990, affirming a judgment of conviction and sentence imposed thereon entered in the United States District Court for the Southern District of New York on October 4, 1989. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied by the Court of Appeals on November 7, 1990, by an order which is reproduced in Appendix B below. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .; nor shall any person. . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

STATUTES INVOLVED

Section 241 of Title 18, United States Code, provides:

Conspiracy against rights of citizens

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Section 242 of Title 18, United States Code, provides:

Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Section 1983 of Title 42, United States Code, provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

INTRODUCTION

The petitioning police officers face two years imprisonment on the sole *per se* basis of a jury finding that, of the innumerable misdemeanor arrests which they have made, eight were without probable cause.

The Court should grant *certiorari* and decide this case in order to reaffirm the position of police officers and other enforcement officials in respect of the criminal sanctions of the Federal civil rights laws provided in Sections 241 and 242 of Title 18. The decision below asserted that the felony provisions of Section 241, directed at mobs taking the law into their own hands, had subsumed the misdemeanor provisions of Section 242, which is directed at deprivation of civil rights by officials acting in their official capacities. The decision goes on to hold that the ambit of these criminal enactments could be set by the grounds for civil remedies provided in Section 1983 of Title 42. Standing as such, the authority of this unprecedented decision widely expands the criminal exposure of enforcement officials beyond that indicated in the language of the provisions which were adopted some 120 years ago.

Petitioners respectfully submit that *certiorari* should also be granted so that this Court may rule on whether petitioners' Fifth Amendment rights were denied by the deliberate injection of a charge of racial motivation by the Government without any basis whatsoever into the Grand Jury proceeding; and on whether an indictment citing racial motivation was substantially changed by the elimination of such charge at the trial, treating it as mere surplusage.

Certiorari should also be granted to consider the impact on Fifth Amendment rights by the conduct of the Government in summation after the trial in denouncing petitioners as "liars", referring to their contemporaneous notebooks as "lies", and making reference to the fact that petitioners did not take the stand to defend themselves.

FACTS

This case is based upon eight misdemeanor arrests by petitioners who were acting exclusively as police officers of the New York City Transit Authority (the "Transit Authority"). The asserted bases of the arrests were for "jostling" (attempted larceny) and "mashing" (sexual advances) on subway trains and platforms. The arrests in issue were culled by the Government from innumerable such arrests by petitioners. No one who was arrested was incarcerated, injured or fined. In accordance with the routine procedures of the Transit Authority respecting such incidents, each was taken in custody to a precinct station house, and advised of his rights and that absent any further such violation during the succeeding six months the charges would be dropped and expunged from his record. Each was then released on his own recognizance. No one who was arrested requested a hearing when asked. There was no publicity.

Following each arrest, the New York County District Attorney's office sent a routine letter containing a questionnaire to the named victim of the misdemeanor. Six of these were returned properly filled out. One victim responded by letter written by another pleading that he did not want to become "involved."

The arrests of petitioners themselves some four years later and the Grand Jury proceedings below took place in the context of deliberately publicized, explicit racial charges. And indeed the indictment herein specified the racial aspects in each of its eight counts (seven under Section 241 and one under Section 242 of Title 18).[1] At the trial, the Government conceded that it did not

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[1] The Grand Jury returned the following indictments in Counts One through Three and Five through Eight (under Section 241), that petitioners conspired:

> to injure, oppress, threaten and intimidate a citizen of the United States in the free exercise and enjoyment of the right secured to him by the Constitution and laws of the United States not to be deprived of liberty without due process of law, in violation of Title 18, United States Code, Section 241 [with the] object . . . that

(Footnote continued)

have any evidence at all that the arrests were racially motivated, and so the trial court "whited out" the racial references in the indictment, treating them as surplusage, and sent it as altered to the jury. There is no indication that petitioners were motivated in making any of the eight misdemeanor arrests except to perform their duties as police officers.

At the trial the petitioners chose to rest their case on their contemporaneous notebooks which were in evidence. In his summation the prosecutor repeatedly denounced the notebooks as "lies" and the petitioners as "liars", and he then went on to exclaim: "Did they offer any explanation for these lies[?] No[!]" Any such "explanation" under the circumstances could only have come from the petitioners themselves. The prosecutor nimbly backed away and the trial court of course admonished the jury, but the wrongful injury had been effectively and deliberately inflicted.

The jury found the eight misdemeanor arrests charged in the indictment as amended were without probable cause and concurrent sentences of two years imprisonment were imposed on

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> the defendants . . . acting in their capacity would and did arrest *a member of a racial minority, . . . to wit [here were variously inserted the terms "a black man", "an Hispanic man", "a person of apparently Hispanic descent" and "an Asian man"]* knowing that the arrest was false, baseless and without probable cause.

The charge in Count Four (under Section 242) was that the petitioners,

> acting under color of state law, unlawfully, wilfully and knowingly deprived an inhabitant of the State of New York of the right secured to him by the Constitution and laws of the United States not to be deprived of liberty without due process of law, to wit, the defendants, acting in their capacity as officers of the Transit Police, arrested *a member of a racial minority, to wit, a black man* . . . knowing that the arrest was false, baseless and without probable cause.

The underscored portions were "whited out" by the trial court on the admission of the Government at trial that it had no evidence to support any charge of racial motivation.

petitioners by the trial court under the felony provisions of Section 241. Thereafter, on appeal, the Court of Appeals unanimously affirmed the judgments of conviction and remanded the case to the trial court for clarification of the sentence imposed on Count Four, the single Section 242 count. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied by the Court of Appeals.

REASONS FOR GRANTING THE PETITION

The Decision of the Court of Appeals Asserts a New Interpretation of Section 241 of Title 18 which is of Exceptional Importance.

The decision below erroneously, petitioners submit, approved of the application of Section 241, Title 18, to the situation at hand and accordingly nullified the provisions of its companion, Section 242 of Title 18.

Initially, a comparison of the plain language of Sections 241 and 242 makes it clear that government officials operating under the burden of enforcing the law and within the constraints of formal official procedures should be treated – if at all criminally – pursuant to the misdemeanor provisions of Section 242 respecting denials of the rights of the citizenry. They accordingly should not be treated under the felony provisions of Section 241 as persons operating as a mob taking the law into their own hands.

Petitioners do not assert, and never have, that a governmental official may not be a member of such a mob operating out of the context of official procedures or that in fact police officers might not possibly constitute such a mob and therefore be subject to Section 241. But that so obviously is not the situation at hand.

Petitioners do not in any way base their position on a differentiation between the rights protected; they base it entirely on the clear and stated differentiation of the circumstances and those involved in a deprivation of such rights. It is true that in the past distinctions have been asserted between "rights" as used in Section 241 and "rights" as used in Section 242; but again, petitioners have never based their challenge to the indictment on any such differentiation. The differentiation asserted by petitioners is between a mob taking the law into its own hands as covered by the felony provisions of Section 241 and governmental officials, particularly those charged with protecting the public,

acting within the context of official procedures as dealt with by the misdemeanor provisions of Section 242.

It is respectfully submitted that the court below in its decision misinterprets Section 241 as completely comprehending Section 242 merely because the rights protected are the same, and it therefore places governmental officials acting under the burden of enforcing the law in the same category as a mob taking the law into its own hands.

This creates a precedent which places all enforcement officials in a category with a mob merely on a finding by a jury that they acted without probable cause; and, as was said on the appeal to the Court of Appeals and is repeated here, *it is without authority or precedent.*

The decision below relies for its authority on *United States v. Price*, 383 U.S. 787 (1966). It holds that *Price* effectively overruled *United States v. Williams*, 341 U.S. 70 (1951), which had spelled out the differentiation between the sections, in respect of the *rights* covered. However, again this is not the issue raised by petitioners. The issue is not as to rights but rather as to whether such rights are criminally protected *in this situation* by Section 241.

The facts of *Price* bear no substantive relationship to the facts before this Court. In *Price* a local sheriff was found to have conspired with a mob and accordingly expelled three civil rights workers from the security of a jail in the middle of the night onto a lonely road where the mob ambushed them and murdered them. Surely, simply because a particular defendant was a sheriff did not detract from the fact that he was acting as a part of a mob which was taking the law into its own hands. To assert that *Price* is authority for the applicability of Section 241 in a situation such as that at hand is to assert that Congress did not originally intend to differentiate at all between two entirely different practical situations, and that in its 1989 amendments of Sections 241 and 242 Congress did not reaffirm that differentiation.

From the 120 years since the enactment of Sections 241 and 242, the decision below could cite only the single instance of *United States v. Garza*, 754 F.2d 1202 (5th Cir. 1985), as authority for the proposition that Section 241 is appropriate for an arrest without probable cause. Yet the facts of *Garza* bear no relationship to those at hand. It is true that Garza was a local sheriff, but he was acting together with another who had no official capacity (in fact he had been convicted of narcotics violations). He "arrested" various persons without any warrant and made no report of the "arrests." There were no arraignments. Some of those arrested were simply held by Garza and his confederate in the local jail for extended periods without even toilet facilities. They were beaten and finally released without any hearing. Under these circumstances Garza and his colleague were charged under both Section 241 and Section 242. It is clear that aside from the fact that Garza happened to be a sheriff and that those whom he "arrested" were placed in a local jail, there is no basis to believe that he was acting in the context of any concept of proper legal procedure, and under these circumstances the charges under both Sections 241 and 242 would seem to be appropriate. But they bear no substantive relationship to the facts before this Court and certainly should not be regarded as precedent for the abolition of the differentiation provided by Congress between Section 241 and Section 242.

The Decision Misinterprets Section 242 in Affirming the Conviction Under Count Four.

The decision below holds that an arrest without probable cause is *per se* a violation of Section 242 as well as of Section 241. Section 242 requires a willful intent to deprive an inhabitant under color of law of a Constitutional right, and the question is whether for the purpose of this criminal section mere arrest should be the standard. Is for the purpose of criminal sanction the Constitutional concept of liberty and due process consistent with a brief detention under "color of law" such as that involved here? In the facts under Count Four – and in every other instance – each person arrested had full access to all of those rights which constitute due process of law. It trivializes rather

than strengthens the criminal sanctions in support of the Constitutional concept of liberty to use them as they are in the decision below. Due process is reduced to a nullity if every error in procedure is a denial of due process, if the procedure itself exists to rectify such error. Specifically as to the case at hand, it is to be noted again that each person arrested remained in temporary custody approximately two hours during which each was informed of his Constitutional rights and each was released on his own recognizance. And in each case, pursuant to the overall policy of the District Attorney's office, the charges were dropped from the records after six months absent a repeat of the offense. In other words due process in the full sense was not denied to the arrested person named in Count Four or any of the other persons arrested.

Over the 120 years since its enactment, Section 242 has been seldom used in connection with arrests at all, and petitioners have consistently asserted that it has *never* been used respecting an arrest *per se* as it was in the decision below.

The decision below *in response* cites *United States v. Williams*, 341 U.S. 97 (1951). But that decision, known as "Williams II," involved a "special police officer" who "seized" persons (as distinguished from arresting them) and then went on to beat them into giving confessions. Obviously this is not authority properly applicable to what is charged in the indictment here. Also cited in the decision, and likewise inapplicable, are: *United States v. Classic*, 313 U.S. 299 (1941) (falsification by Commissioner of Election of a ballot count in a Congressional election); *United States v. Ramey*, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965) (arrest on a fictitious warrant followed by extended incarceration without arraignment in order to keep election official from performing his duties); *United States v. Walker*, 785 F.2d 1237 (5th Cir. 1986) (assault on person arrested and purported arrest of a reporter with a film of the assault in order to extort film from him); and *United States v. Alonso*, 740 F.2d 862 (11th Cir. 1984), *cert. denied*, 469 U.S. 1166 (1985) (a RICO case in which the homicide office of a police department was found to be a corrupt

organization which among other things extorted and stole money from arrested persons).

In short, there is *not one instance* in the 120 years since the adoption of Sections 241 and 242 in which either section has been held to apply to an arrest as such found to be without cause.

The decision below finally cited *Conway v. Village of Mt. Kisco*, 758 F.2d 46 (2d Cir. 1985), *cert. dismissed*, 479 U.S. 84 (1986), as authority for the application of these penal provisions in situations of a simple misdemeanor arrest without probable cause. *Conway* was a *civil* action under Section 1983 of Title 42 for damages for malicious prosecution. Section 1983 is remedial legislation providing civil damages and injunctive relief. As such it is to be and has been liberally construed and applied with flexibility in order to achieve its remedial objective. On the contrary Sections 241 and 242 of Title 18 are penal laws and as such they are to be and have been – at least to date – strictly construed. Expanding the penal coverage of Sections 241 and 242 so as to move with the flexible, remedial ambit of Section 1983 is a mighty alteration of these criminal laws and a basic change respecting construction of criminal law. The decision below will be authoritative precedent to that end, and it is accordingly most important that it be reviewed by this Court.

False Racism Charges, The Grand Jury Proceeding and Indictment and the Prosecutor's Summation.

The decision below notes that the unfounded charges of racism in the indictment were deleted by the trial court before it was submitted to the jury. But, it overlooks the major television and newspaper events sponsored by the prosecution at the time the petitioners were apprehended and arraigned and presentation was made to the Grand Jury. The focus of media attention was directed to the underlying charge of racism. It was in this context that the indictments were obtained.

It need not be said that such charges asserted in the racial tinderbox of today in New York City would have a decisive effect – as obviously intended. The petitioners, pilloried as racial bigots, did not have a chance before the Grand Jury.

In this respect petitioners were denied a fundamental procedural right guaranteed in the Fifth Amendment to the Constitution, admittedly so when, at the conclusion of the trial, the prosecutor stated that the Government never had any support whatsoever for the racial charges. This incendiary material was released to the media and put in the indictment knowingly "without probable cause" - indeed, without any cause.

This Court has "presupposed" a constitutional requirement that a Grand Jury be unbiased. Wright, *Federal Practice and Procedure*: Criminal 2d § 102, p. 209 (1982) (citing cases). While its concern has focused on the ethnic makeup of panels, surely the deliberate inciting of racial passions *to create a bias* calls for the scrutiny of the Court.

The trial court deleted the racial charges and the decision below treated this as not a substantive alteration, merely the elimination of one of the objects of the conspiracy. Petitioners submit that upon a reading of the charges (see footnote at p. 7) and noting the underscored material which was deleted, it is clear the charges as amended by the trial court were not *substantively* what the Grand Jury found. Instead of being charged with a conspiracy directed at a specific ethnic group—a racial charge—they were accordingly charged with a conspiracy without a purpose, against just anybody. *See Stirone v. United States*, 361 U.S. 212 (1960). The charges thus became crimes without motive—certainly not of the sort contemplated by the Civil Rights Laws.

Above all, it is submitted respecting prosecutorial conduct that this Court should not countenance the deliberate use of false and inflammatory allegations designed to incite racial passions, for any tactical purpose of the prosecution. And consider again, the position of the Government on appeal that these charges were not of any substantive importance to begin with. This matter should not be treated as a mere technical amendment as it was in the decision below.

And, finally, it is in this context that the Court should consider the remarks of the prosecutor on summation.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted, and the Court should resolve the Constitutional and statutory questions which have been posed.

Respectfully submitted,

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January 29, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 766—August Term, 1989

(Argued February 26, 1990

Decided September 21, 1990)

Docket No. 89-1507

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MARY MCDERMOTT and ALPHONSE IANNACONE,

Defendants-Appellants.

Before:

OAKES, *Chief Judge*,
KEARSE and WALKER, *Circuit Judges*.

Appeal from judgments of the United States District Court for the Southern District of New York, Shirley Wohl Kram, *Judge*, of conviction of conspiracy by New York City Transit police officers to violate the civil rights of several subway riders by false arrests, 18

U.S.C. §§ 241, 242. Affirmed over arguments that § 241 does not apply to police officer conspiracies and that the trial court improperly amended the indictment, that the evidence was insufficient, and that prosecutorial summations were inflammatory.

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DANIEL A. NARDELLO, New York, NY (Otto G. Obermaier, United States Attorney for the Southern District of New York, Kerri Martin Bartlett, Assistant United States Attorney, of counsel), *for Plaintiff-Appellee.*

OAKES, *Chief Judge*:

This is an appeal by two former New York City Transit Police officers, Mary McDermott and Alphonse Iannacone, from judgments of conviction for conspiracy to violate the constitutional rights of seven citizens by false arrest, 18 U.S.C. § 241 (1988), and for falsely arresting a non-citizen resident of New York State and thereby depriving him of his constitutional rights in violation of 18 U.S.C. § 242 (1988). Trial was before the United States District Court for the Southern District of New York, Shirley Wohl Kram, *Judge*, and the appellants were convicted on all eight counts and each sentenced to two-year terms of imprisonment. We affirm

the judgments of conviction, and remand for clarification of the sentences.

During the period from May 24, 1983 to March 27, 1984, McDermott and Iannacone were partners in the Anticrime Unit of District Four of the Transit Police Department and their duty included an assignment to the Lexington Avenue IRT subway line. Counts One through Three and Five through Eight of the superseding indictment relate to appellants' arrest of the seven citizens and Count Four to the arrest of the non-citizen. Each of the arrests was made for sexual abuse on the subway, except for one case that involved an alleged attempted grand larceny and jostling. Each of the alleged sexual offenses involved the male arrestee pushing up against the back of the alleged female victim, except for one that involved a male arrestee pushing a newspaper against the alleged female victim's body.

The complaint in Count One charged that the appellants violated Wayne Dickson's constitutional rights by falsely arresting him, on May 24, 1983, for sexual abuse on the Lexington Avenue subway line. Dickson was ordered off the train, arrested, handcuffed, told that he had been seen looking at an "hispanic lady" on the train. He was then transported to the District Four office at the 14th Street subway station, and issued a Desk Appearance Ticket ("DAT") informing him of the charges against him and indicating when he was to appear in court. He was then released after two-to-four hours' detention, with the charge against him ultimately being dismissed. The police reports prepared by the appellants indicated that the alleged victim reported the supposed event and that Dickson was arrested on the victim's "complaint." Although the reports described

Dickson's offense as "sex abuse," the Penal Code section listed on the reports was for attempted Grand Larceny, the charge for pickpocketing. When McDermott met with an Assistant District Attorney ("ADA"), she told him that Dickson had "prior arrests for [sexual abuse]," but in fact Dickson had no prior arrest record whatsoever. A complaint was prepared charging Dickson with sexually abusing the victim "by rubb[ing] his crotch area into [her] buttocks," and alleging further that McDermott was "informed by [the victim] that [Dickson] did not have her consent" to touch her. Both Dickson and the alleged victim testified at appellants' trial that nothing had transpired between them. Rather, the victim said that when she got off the subway at 42nd Street, McDermott identified herself as a police officer and said that she had seen someone trying to steal something from the victim's pocketbook. The victim added that she had been "very surprised" when she learned that the man arrested had in fact been charged with sexual abuse, and so had written a letter to the criminal court stating that "the incident . . . didn't have nothing to do with any sexual approach," and that McDermott had told her only that somebody had tried to steal something from her pocketbook.

Count Two involved the false arrest of Alan Thomas, also at the 42nd Street stop of the Lexington Avenue subway line, on August 17, 1983. The police report prepared by the appellants indicated that the alleged victim reported the supposed act of sexual abuse and that Thomas was arrested on the victim's "complaint." Like Dickson, Thomas was taken in handcuffs to District Four for processing and released on a DAT. The charge against him was "adjourned in contemplation of dismissal," N.Y. Crim. Proc. § 170.55 (McKinney 1982 &

Supp. 1990), and was ultimately dismissed. Both Thomas and the victim testified at trial that nothing had happened between them. Thomas also testified that, shortly after his arrest, he had heard Iannacone ask McDermott if the victim had "cooperated."

Counts Three and Four involved the false arrests of Byung Kim and Orrett Hall on September 16, 1983, at the 14th Street station of the Lexington Avenue subway line, for committing acts of sexual abuse on two different female victims while all were riding in a single subway car. McDermott supposedly viewed one incident and Iannacone the other. Each officer prepared a report of a supposed "bumping and rubbing" incident. Kim was handcuffed, taken to District Four, and released on a DAT; the charge against him was adjourned in contemplation of dismissal. Hall was handcuffed, taken back to District Four, and told by Iannacone that "it would be a lot easier for [him] to plead guilty." Hall refused to plead guilty, was released on a DAT, and the charge against him was ultimately dismissed. At appellants' trial, both victims said that nothing had happened to them on the subway. One victim testified that McDermott had told her that she had seen a man "exposing himself" and "rubbing against" the victim, but the victim had told McDermott that she "didn't see anything and didn't feel anything," and would not press charges. Similarly, the other victim told McDermott that she had neither seen nor felt anything and would not press charges.

Count Five involved Guilharmae Dos Santos at the 28th Street station of the Lexington Avenue line on October 5, 1983. McDermott claimed that she saw Dos Santos "place his left hand in [a] female's purse upon

entering [the] train and then while on [the] train place his hand in [a] male['s] pocket." Iannacone told the first victim that a man had tried to pick the victim's purse, but nothing was missing from the purse and neither appellant asked the victim whether she could identify the alleged pickpocket or was willing to press charges. Iannacone and McDermott ordered the second victim off the train and asked him for his name and address, but they never asked him whether he could identify the alleged pickpocket or if he was willing to press charges. The police reports prepared by the appellants, however, indicated that the purported victims had reported the attempted thefts, could identify Dos Santos, and were willing to press charges against him. Shortly after the arrest, McDermott told the ADA that he and Iannacone had seen Dos Santos switch from the northbound to the southbound trains at 42nd Street, place his hand in one victim's purse while on the platform, and, while on the train, reach through the rear vent of the other victim's coat and put his hand into the victim's left rear pocket. The complaint charged Dos Santos with attempted Grand Larceny and Jostling, and McDermott swore to the complaint. On the advice of a lawyer, Dos Santos pleaded guilty to a disorderly conduct charge, the penalty for which was waived. He said he pleaded guilty because he did not want to go to court and lose a day's pay.

Count Six involved the arrest of Robert Young at the 14th Street station of the Lexington Avenue subway on February 2, 1984. McDermott and Iannacone ordered Young off the train and handcuffed him; when Young asked McDermott what he had done, she told him to "shut the fuck up." The police report stated that Iannacone had seen Young pressing on a victim's but-

tocks and that the victim had felt the pressing and stated that she was willing to press charges. Young was charged with Sexual Abuse in the Third Degree. Like the others, Young was taken to District Four, issued a DAT and released, and the charges against him were ultimately dismissed. In a civil case brought by Young for false arrest in New York State Supreme Court, a jury found for Young. Iannacone testified at that trial that he had interviewed the victim, who had said that she was annoyed by the male and had given an identification. At the trial of appellants, however, the victim flatly denied making any complaint to the appellants and described their accounts as "fictitious." The victim testified that she had been informed by McDermott that a man standing behind her had made some sort of a gesture toward her; it was for this reason only that she had given McDermott her name and business address.

Count Seven involved Lorenzo Calhoun, who, on March 26, 1984, was arrested at the 42nd Street station of the Lexington Avenue line, taken to District Four, processed, issued a DAT, and released, with the charges against him for Sexual Abuse in the Third Degree ultimately being dismissed. According to Iannacone's memo book entry, Calhoun first rubbed an unidentified woman's left thigh with his newspaper. Although "visibly shaken," the woman purportedly told Iannacone that there was "no problem" and then "went away." Calhoun then supposedly crowded a second female victim against a car door and rubbed "her vaginal area" with his newspaper. Iannacone claimed to have interviewed the second victim, who told him that Calhoun was annoying her without her consent. Appellants' police reports name the second victim as reporting the incid nt and indicate that she could identify Calhoun

and was willing to press charges. Iannacone told the ADA that he had seen Calhoun rub the second victim with his hand; he made no mention of the newspaper described in his reports. At trial, the second victim testified that she had never made the statements attributed to her by Iannacone and that nothing had in fact happened. According to the victim, McDermott said that she had seen a man on the train sticking a newspaper between the victim's legs and that she just needed the victim's name and address for the record. Not only was she never asked if she were willing to press charges, the victim added, but she even told McDermott that she "couldn't testify because [she] didn't feel or see anything."

Finally, Count Eight involved the arrest of Hector Mateo at the 42nd Street station of the Lexington Avenue subway on March 27, 1984. Iannacone allegedly saw Mateo board the train, position himself behind the twelve year old victim and rub against her. Iannacone then ordered Mateo off the subway train, and searched, handcuffed and arrested him. Mateo was never informed of his rights. McDermott told Iannacone in front of Mateo that the victim had said that "she felt something behind her." Appellants' reports indicated that the victim's "aunt"—really a family friend—had reported the incident to the officers and that the girl could identify Mateo and would press charges. Mateo was taken by train to District Four for processing and held in custody for over two days. McDermott's complaint charged Mateo with Sexual Abuse in the Third Degree and Endangering the Welfare of a Child. The charges were ultimately adjourned in contemplation of dismissal. At appellants' trial, the alleged victim and the family friend testified that no one had stood behind

the victim during the subway ride in question. According to their testimony, McDermott had asked them to step off the train at 42nd Street, asked the victim for her name, address and Social Security number, and told the family friend that she had seen a man behind the victim rubbing against the victim's back. However, the victim told the family friend that she had not felt anything and the friend told McDermott that nothing had happened. The victim was never asked if she could identify Mateo or if she would be willing to press charges.

At trial, the Government's case included not only the testimony of all eight men arrested by appellants, but also the seven women and one man who were the arrested men's purported victims, several assistant district attorneys from the New York County District Attorney's Office who prepared the criminal charges following interviews with McDermott and Iannacone, and an expert in transit police procedures. The Government also introduced appellants' diaries and arrest reports, their statements to the arrested men and the purported victims of those men, and their statements to the ADAs, as well as their sworn testimony in Robert Young's civil case. Appellants' evidence consisted of the testimony of two experts, one a lieutenant with the transit police, who testified on transit police procedures, and the other a clinical psychologist and the Director of the Sexual Behavior Clinic at New York State Psychiatric Institute, who testified on "frottage," the clinical term given to the sexual deviation whereby individuals, called "frotteurs," achieve sexual gratification by rubbing or touching the body of non-consenting persons.

DISCUSSION

Counts One through Three and Five through Eight charged seven separate conspiracies by appellants

> to injure, oppress, threaten and intimidate a citizen of the United States in the free exercise and enjoyment of the right secured to him by the Constitution and laws of the United States not to be deprived of liberty without due process of law, in violation of Title 18, United States Code, Section 241 [with the] object . . . that the defendants . . . acting in their capacity . . . would and did arrest a member of a racial minority, . . . [here were variously inserted the terms of black man, an hispanic man, a person of apparently hispanic descent, an asian man] knowing that the arrest was false, baseless and without probable cause.

The charge in Count Four was that the appellants,

> acting under color of state law, unlawfully, wilfully and knowingly deprived an inhabitant of the State of New York of the right secured to him by the Constitution and laws of the United States not to be deprived of liberty without due process of law [in that] the defendants, acting in their capacity as officers of the Transit Police, arrested a member of a racial minority, to wit, a black man . . . knowing that the arrest was false, baseless and without probable cause

in violation of 18 U.S.C. § 242. At the conclusion of the evidence, following appellants' motion for judgment of acquittal, Fed. R. Crim. P. 29, the court directed the court clerk to eliminate any references to race in the indictment and denied the motion.

Appellants' principal argument is that the facts underlying Counts One through Three and Five through Eight do not constitute offenses under 18 U.S.C. § 241. The claim is that "since [its] enactment in 1870, the provisions of Section 241 have *never* before been held to cover an arrest without probable cause by police officers." Brief for Appellants at 14. Appellants contend that section 241 is directed at persons who take the law into their own hands, like members of a mob, vigilantes, the Ku Klux Klan, or the like; it is section 242, they claim, that covers actionable denials of constitutional rights by police officers. Section 241 speaks of "interference" with constitutional rights, whereas section 242 speaks of the "deprivation" of such rights. It is circuitous, the argument runs, to bootstrap section 242 onto section 241 by charging an "interference" with the right "not to be deprived" of a right. We note that violation of section 241 is a felony, carrying an authorized penalty of ten years' imprisonment, while section 242 is a misdemeanor calling for a fine of not more than $1,000 or imprisonment for not more than one year, or both (unless, under the law then in effect, death resulted, in which case imprisonment for any term of years or for life could be imposed).

Appellants place principal reliance on *United States v. Williams*, 341 U.S. 70 (1951) ("*Williams* I"), in which Justice Frankfurter, writing for a plurality of four, said that section 241 "applies only to interference with rights which arise from the relation of the victim and the Federal Government, and not to interference by State officers with rights which the Federal Government merely guarantees from abridgement by the States," *id.* at 81-82, and that "interference with civil rights by State officers was dealt with fully by" what is now section 242,

id. at 75. Were this case still good law, appellant's argument would have merit. However, in *United States v. Price*, 383 U.S. 787, 798 (1966), the Supreme Court effectively overruled *Williams* I, clearly establishing the applicability of section 241 to deprivations of Fourteenth Amendment rights. "[W]hatever the ultimate coverage of the section may be," the Court wrote, "it extends to conspiracies otherwise within the scope of the section, participated in *by officials alone* or in collaboration with private persons." *Id.* (emphasis added). As stated in *United States v. Guest*, 383 U.S. 745 (1966), decided on the same day as *Price*, "when § 241 speaks of 'any right or privilege secured , . . by the Constitution or laws of the United States,' it means precisely that." 383 U.S. at 753.

More recently, judicial analysis of sections 241 and 242 has served to reaffirm that *Price* "outlined the legislative history of [sections 241 and 242] and rejected arguments that they must be interpreted to preclude duplication of rights protected." *United States v. King*, 587 F.2d 209, 211 (5th Cir.), *cert. denied*, 440 U.S. 972 (1979). In sum, "[a]ny right protected under § 242 must be included under those protected under § 241." *Id.*

It is also inaccurate to suggest that there has not been a deprivation of rights in this case. False arrest is an act of unlawful detainment that constitutes a violation of due process and in turn is a "deprivation" of a legal right. *See United States v. Garza*, 754 F.2d 1202 (5th Cir. 1985); *cf. Conway v. Village of Mt. Kisco*, 758 F.2d 46, 48 (2d Cir. 1985) (malicious prosecution sufficient as a cause of action under 42 U.S.C. § 1983), *cert. dismissed*, 479 U.S. 84 (1986). In *Garza*, defendant police officers were convicted under both sections 241

and 242 for arresting persons without warrants and without probable cause. *Garza* thus also belies appellant's contention that section 241 has never been used as the basis for a felony prosecution of police officers who made arrests that have been without probable cause.

Appellants' next argument goes only to their conviction under section 242, as charged in Count Four, for depriving Orrett Hall, a non-citizen resident of New York, of his constitutional rights. Since there was only a "very limited detention" in the false arrest of Orrett Hall, they argue, there was no separate inhibition of "the exercise of any Constitutional right." Brief for Appellants at 23. Besides using the words "very limited" in a novel way, appellants' argument is wrong as a matter of law. On his way home from work at the time of his arrest, Hall was ordered off the train at 14th Street, placed under arrest, handcuffed, transported to District Four for processing, and only then released on a DAT. Due process requires probable cause for an arrest, and when police officers acting in bad faith make an arrest without probable cause, the person arrested has suffered a deprivation of liberty without due process of law.

The suggestion that section 242 has never been used in a situation like the one alleged in Count Four is incorrect. In *United States v. Williams*, 341 U.S. 97 (1951) ("*Williams* II"), the Supreme Court affirmed the conviction of the defendant police officer who was charged with unlawfully seizing employees suspected of stealing property from the company and then obtaining coerced confessions. The Court held that " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of

state law, is action taken "under color of" state law' " within the meaning of section 242. *Id.* at 99 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). *See also United States v. Ramey*, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965); *United States v. Walker*, 785 F.2d 1237 (5th Cir. 1986); *United States v. Alonso*, 740 F.2d 862, 872-73 (11th Cir. 1984), *cert. denied*, 469 U.S. 1166 (1985). As *Ramey* said, "[t]he contention . . . that lack of violence or abuse denudes or abates the offense is groundless." 336 F.2d at 514.

We note, however, that the court's sentence for two years was presumably on the felony counts and not on the misdemeanor conviction under Count Four. On remand to the district court, the sentence should be so clarified.

The next argument is that the trial court improperly amended the indictment, especially since the opening statements had ethnically identified the witnesses. But the indictment alleged three objects of the conspiracy, not just the one pertaining to the arrest of a member of a racial minority. The additional objects were that the appellants (a) "would and did make an arrest knowing it was false, baseless and without probable cause" and (b) "would and did conceal from the individual arrested and from law-enforcement authorities that the arrest was false, baseless and without probable cause." Moreover, read technically, the language in the charging paragraph of the section 241 counts did not allege that the appellants conspired to interfere with the constitutional rights of members of an ethnic minority but rather that the appellants conspired "to injure, oppress, threaten and intimidate . . . citizen[s] of the United States" in the exercise of their constitutional rights. The only refer-

ence to race or ethnicity was the factual statement in one of the three objects alleged in each conspiracy count. We do not see that racial motivation was in fact alleged in the indictment.

Thus, what the trial judge struck was only one of the objects of the conspiracies and there is no claim that the jury was improperly instructed on the law of conspiracy. As we held in *United States v. Weiss*, 752 F.2d 777, 787 (2d Cir.), *cert. denied*, 474 U.S. 944 (1985), a constructive amendment of an indictment occurs when the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the appellant may have been convicted of an offense other than that charged in the indictment. *See also United States v. Attanasio*, 870 F.2d 809, 817 (2d Cir. 1989). Here, the trial proof paralleled the crimes charged. In *United States v. Knuckles*, 581 F.2d 305, 312 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978), we noted that "convictions are not now set aside except for variances resulting in substantial prejudice to the defendant." The only prejudice claimed here is that the jury was "forcefully focused from the opening statements" on the issue of racial motivation. Brief for Appellant at 26. In fact, race was mentioned only briefly in the opening statement of Iannacone's counsel, who attacked the Government for not saying "anything about . . . racial minorit[ies] in their opening statement." Finally, the racial aspects of the case were taken out at the request of appellants.

Appellants next challenge the sufficiency of the Government's proof at trial. The crux of the argument is

that the testimony of the seven purported victims of sexual abuse—each of whom stated that nothing had happened to her—is "innately of little value" because there is a known and strong reluctance on the part of any female victim to admit to a sexual advance. Brief for Appellants at 29. But the jury rejected that argument and there is no reason that we should reassess the evidence. We note, however, that one victim freely testified that she had been the victim of sexual advances while riding on the subway on several occasions unrelated to the one at trial and that she had also told her parents and husband about these incidents. Appellants also attack the credibility of the eight men falsely arrested, arguing that it would be absurd to suppose that they would admit to the misdemeanors charged. Yet they were subjected to extremely hostile cross-examination that probed at length into their sexual propensities. Accordingly, we reject the appellants' sufficiency claim.

Appellants next argue that three statements made in prosecutorial summations were highly inflammatory and in bad faith. Their first claim is that the Government commented on the appellants' failure to offer any evidence, including their own testimony, in their defense. The second claim involves a reference in appellants' memo books to a notation "CN," which in the Transit Authority Police Department stood for "conditions normal"; the prosecutor said, "that's more like coffee and a nap for these two defendants." And the third point is that the Government made numerous references to lies and liars in both summations, thereby improperly placing its own credibility into the summations.

As to the first comment, at the end of the main summation, after reviewing the testimony of the Govern-

ment's witnesses, the prosecutor turned to the appellants' argument that they had made the arrests in "good faith." The prosecutor asked the jury to consider the false statements as evidence of the wrongful intent and then turned to the defense case and asked: "Did they offer any explanation for these lies? No. The defendants put on two witnesses." The Government then described the testimony of both defense witnesses; defense counsel objected and moved for a mistrial; the court denied this motion; and the prosecutor finished his discussion of the defense witnesses and concluded his summation without any further objections. Following the Government's summation and a luncheon recess, defense counsel proposed that the trial judge give the jury a curative instruction with respect to the Government's remarks. The judge did so, saying:

> I want you to know that really is not appropriate, and I have indicated that [it] should be stricken from the record, and you are to strike it from your minds as well. The defendants are presumed to be innocent, and they don't have to produce any evidence, nor do they have to call any witnesses. The government has the burden at all times of proving the defendants guilty beyond a reasonable doubt, and that is the primary principle that you have to keep in mind.

While it is axiomatic that the Government may not comment on a defendant's failure to testify at trial, we have held that a prosecutor is entitled to comment on defendant's failure to call witnesses to contradict the factual character of the Government's case, as well as on defendant's failure to support his own factual theories with witnesses. *See United States v. Bubar*, 567 F.2d

192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977); *see also United States v. Gotchis*, 803 F.2d 74, 81 (2d Cir. 1986). It is only when the evidence that the defendant has not adduced is in the control of the defendant alone or where the jury would naturally and necessarily interpret the Government's summation as a comment on the defendant's failure to testify that the Government's comments run afoul of the Fifth Amendment. 567 F.2d at 199. Here, the Government's remarks amounted to no more than an allusion to appellants' failure to call witnesses to support their theory that the arrests had been made in good faith. Moreover, we think that, particularly in light of the district court's curative instruction, we cannot deem that the remarks in question were anything other than harmless constitutional error. *See United States v. Hasting*, 461 U.S. 499, 507-12 (1983).

As to the "coffee and a nap" remark, the Government argues that it was a permissible response to the appellants' summation arguments about their lack of criminal motivation; both defense counsel asked, in effect, why would Iannacone and McDermott make false misdemeanor arrests on the subway and jeopardize their careers to arrest these people. In rebuttal, the Government suggested that by making false arrests the appellants could keep their activity up without having to make any more arrests on the days that they had already attained their necessary "stats" through false arrests. The Government argued that "[i]f you want to stay in anticrime because there is less supervision, you are out of the public eye . . . you make an arrest early in your tour, you go back to the district a couple of hours, you fill out a couple of pieces of paper. . . . A DAT is issued, you have your stat for the day, and what do you do for the rest of the day?" The answer to this ques-

tion, the Government continued, was found in the memo books of Iannacone and McDermott. After they made their one arrest early in their tour, they went to lunch or to dinner; they then rode around on the subways unsupervised and noted every hour on the hour: "conditions normal." The prosecutor then concluded:

> They were falsely arresting somebody at the beginning of their tour, they were getting him out of the way so they didn't have to take him to central booking. All to keep their statistics up and their freedom the rest of the day so they could ride around the subways. No. Conditions normal—CN. That's more like coffee and a nap for these two defendants.

After defense counsel's objection, the trial judge struck the remark. The Government then concluded its rebuttal summation by noting that only as to two counts was another arrest made by the appellants for the rest of the day, and asking:

> [W]here did all the crime go? Is it only at the beginning of the tour? Is there no crime after the first arrest which happens to be in most of the cases the sexual abuse? How about the robberies, the chain snatchings, and the muggings, where does that happen? Apparently nowhere in the vicinity of Officers Iannacone and McDermott.

This prompted a motion for a mistrial, which was denied. We believe, with the Government, that the evidence indicated that in all but two cases the appellants went out to a meal after the men arrested had been processed and reported no additional incidents after the false arrest.

Appellants' argument as to the Government's injection of its own credibility into its summation is based on the Government's comments that, "[w]e would be negligent if we didn't meet with our witnesses," and "if we polished . . . up [our witnesses] and were so meticulous in the way that we weaved this web of lies . . . why didn't we do a better job of it? Why isn't [it] a seamless web? Why are there inconsistencies? . . . [W]hy didn't we put this case together so everything fit hand in glove?" But all of the comments objected to were in response to defense counsel's summation to the effect that the prosecution had woven a giant tapestry, planned out the pattern or design, selected the materials that it was going to use and woven them in the fashion that it wanted, and that the witnesses were well manicured and well prepared by the prosecutors in preparation sessions at the U.S. Attorney's office and polished up "like fine stones" when they took the stand. Thus we believe the language complained about is simply " 'rebutting language suitable to the occasion.' " *United States v. Praetorius*, 622 F.2d 1054, 1061 (2d Cir. 1979) (quoting *United States v. La Sorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973)), *cert. denied*, 449 U.S. 860 (1980).

Appellants' final argument is that the district court failed to canvass the jury to find out if it had learned of an article about the case that had appeared in the March 10, 1989, *New York Times*. Following the request of defense counsel, the judge stated to the jury the following:

> Now, there has been something in the papers today about this case, rather a lengthy article in one

> paper. While I haven't seen the others, I have been told it has appeared in other newspapers as well.
>
> Have any of you seen or read those articles? (There is no response).
>
> THE COURT: You haven't even seen them? Well, good for you, I'm very glad, because it really is very important.

The trial judge went on to explain that "[t]he newspaper articles may reflect some things that aren't so," and again admonished the jury to avoid articles about the case. Appellants' suggestion that the jury should have been individually interrogated, even though none had indicated that he or she had seen the articles, is simply not what the law requires. The three-step process set forth in our case law requires the court:

> [F]irst, to determine whether the coverage has a potential for unfair prejudice, second, to canvass the jury to find out if they have learned of the potentially prejudicial publicity and, third, to examine individually exposed jurors—outside the presence of the other jurors—to ascertain how much they know of the distracting publicity and what effect, if any, it has had on that juror's ability to decide the case fairly.

United States v. Gaggi, 811 F.2d 47, 51 (2d Cir.), *cert. denied*, 482 U.S. 929 (1987); *see also United States v. Rivalta*, 892 F.2d 223, 228 (2d Cir. 1989); *United States v. Scopo*, 861 F.2d 339, 349 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1957 (1989). In the usual case, it is only necessary to examine individually "exposed" jurors outside the presence of the others. In this case, none of the jurors had been "exposed" to the article in question.

We note that the jurors were given repeated instructions throughout the trial not to read, listen to or watch news reports about the case.

Judgment affirmed.

APPENDIX B

United States Court of Appeals

FOR THE

Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 7 day of November, one thousand nine hundred and ninety:

UNITED STATES OF AMERICA,

Appellee,

v.

MARY McDERMOTT and ALPHONSE IANNACONE,

Defendants-Appellants.

DOCKET NUMBER: 89-1507

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants, Mary McDermott and Alphonse Iannacone.

Upon consideration by that panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that, heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk